

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1700623

COUNTRY OF REFERENCE: India

MEMBER: Mila Foster

DATE: 26 March 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a protection visa.

Statement made on 26 March 2021 at 5:29pm

1.

CATCHWORDS

REFUGEE – protection visa – India – particular social group – love marriages – mixed race relationship – applicant married an Australian citizen – disowned by family – honour killing – Australian citizen child – genuine spousal relationship – applicant now divorced from partner that was subject of protection claims – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 5AAA, 5H, 5J – 5LA, 36, 65, 424, 438, 499
Migration Regulations 1994 (Cth), Schedule 2

CASES

MIBP v Singh [2016] FCAFC 183
MIEA v Guo (1997) 191 CLR 559
MZAFZ v Minister for Immigration and Border Protection [2016] FCA 1081
Prasad v MIEA (1985) 6 FCR 155

2.

3. Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependants.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection on 22 December 2016 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant, who claims to be a citizen of India, applied for the visa on 9 November 2015. She claimed to fear returning to India because her parents and village would kill her for marrying an Australian citizen against her parents' wishes. The delegate refused to grant the visa on the basis that the applicant was neither a refugee nor owed complementary protection.

CRITERIA FOR A PROTECTION VISA

6. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, he or she is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
7. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.
8. A person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country: s.5H(1)(a). In the case of a person without a nationality, they are a refugee if they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to that country: s.5H(1)(b).
9. Under s.5J(1), a person has a well-founded fear of persecution if they fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there is a real chance they would be persecuted for one or more of those reasons, and the real chance of persecution relates to all areas of the relevant country. Additional requirements relating to a 'well-founded fear of persecution' and circumstances in which a person will be taken not to have such a fear are set out in ss.5J(2)-(6) and ss.5K-LA, which are extracted in the attachment to this decision.
10. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of the visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion'). The meaning of significant harm, and the circumstances in which a person will be taken not to face a real risk of significant harm, are set out in ss.36(2A) and (2B), which are extracted in the attachment to this decision.

Mandatory considerations

11. In accordance with Ministerial Direction No.84, made under s.499 of the Act, the Tribunal has taken account of the 'Refugee Law Guidelines' and 'Complementary Protection Guidelines' prepared by the Department of Home Affairs (the Department), and country information assessments prepared by the Department of Foreign Affairs and Trade (DFAT) expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration. DFAT published such a report in relation to India on 10 December 2020. The Tribunal has had regard to that report which includes information about women being subjected to violence for falling in love against their family's wishes¹ as well as inter-faith and inter-caste marriages.²

OUTLINE OF CLAIMS AND EVIDENCE

12. The following is a summary of the claims and evidence in this matter.

Department file

13. The Department file relating to the applicant's protection visa application includes:
 - a. The applicant's protection visa application.
 - b. An audio recording of an interview conducted by the delegate with the applicant on 14 December 2016.
 - c. Handwritten notes dated 25 February 2014 regarding a Departmental visit made to the applicant's residential address (the home visit notes).
 - d. Records of money transfers made by the applicant and [Mr A] (the money transfer records).
 - e. A non-disclosure certificate and notification dated 13 January 2016 relating to the money transfer records.

Protection visa application

14. The protection visa application includes:
 - a. A protection visa application form completed by the applicant.
 - b. A written statement made by the applicant on 9 November 2015.
 - c. Certified copy of the pages of an Indian passport issued to the applicant [in] 2008.
 - d. A certified copy of an Australian marriage certificate relating to the applicant's marriage to [Mr B].
 - e. A record of the decision made by a delegate on 17 June 2014 to refuse to grant the applicant temporary and permanent partner visas (the partner refusal decision record). The delegate found that the applicant was not living with [Mr B] in a genuine and continuing relationship.

¹[3.121].

²[3.134]-[3.144].

15. The applicant stated the following in her written statement:

I [name] of [address], was born on [date] at [location in] INDIA. I first came to Australia [in August] 2009 as a [student]. I am applying for protection visa due to my ongoing circumstances in India.

I got married with [Mr B] [in May 2011]. He is an Australian citizen. When I asked my parents before our marriage they were agree but after a month they told me to leave study and come back to India. They told me that they had been thinking about it and the family had decided that it wasn't right for me to marry someone, who wasn't Indian. They gave me ultimatum that if I didn't leave [Mr B] they would outcaste me from the family. They said come at once or it will be the end of me and they would happily go to prison or hang themselves, they would make sure that I would not survive if I went ahead with this wedding. They said whole village would not let them live because of strong culture beliefs and old traditions. They threat me for my life. But I don't want to leave [Mr B] because I love him, that's why we done our marriage on date as booked and started living together. Then I applied for my spouse visa on 5-10-11. I couldn't get visa and they gave me time to go back India. The main problem for me now is, where to live my life safely because my parents and society people will not let me live over there. I felt myself in dangerous situation because if I go to India they will kill me. Therefore I request your kind office to please help me to protect my life because I also want to live a peaceful, enjoyable and happy life, as I am also a human being. I have desires, dreams and want make my own free decision for my life because this is my life. I also want to have my right to my life in a peaceful freeway.

This is why I don't want to go back to India because I have no security of mine. I don't want to die. I want to live peaceful life. So it is not possible and safe to go back and live anymore in India.

I am applying for protection visa with the hope that your good office will consider my miserable condition in India and please grant me protection visa so that I can live my life peacefully, which is a basic right of all human being.

16. Information the applicant provided in the protection visa application form included the following:

- a. She belonged to the Sikh ethnic group and followed the Sikh religion.
- b. Her parents and [specified family members] lived in India. She contacted her relatives in India by phone.
- c. She had never worked. Her parents supported her prior to her marriage and her husband supported her after her marriage. She sometimes distributed leaflets for which she was paid 'cash in hand'.
- d. She left India in 2009 to come to Australia and pursue further education.
- e. She completed two courses in Australia between July 2009 and July 2010 and withdrew from a third course in November 2011.
- f. In India people kill each other for religion, old traditions and cultural beliefs. They hate change in society. Her parents have the same mentality, do not accept her marriage and threatened her life. If she returned to India, her parents and village would kill her in an honour killing because in her culture people are not allowed to marry outside their caste and religion. Girls especially must marry according to their parents' choice. She married outside her religion and culture – her husband [Mr B] is a Christian from [country]. It is

normal in India for people to fight and kill other people over religion and caste. Each day 92 women are raped in India each day so she cannot trust the authorities who cannot stop crime in India. She could not relocate within India because her parents and village are connected to religious communities and organisations that are spread all over India and have a strong hold in the country. They could find her easily and it is very hard for girls to live by themselves in India without family or a husband.

Delegate's interview

17. At the interview on 14 December 2016 the applicant stated that she had separated from [Mr B] and had continued living with her flatmate, [Mr A]. She indicated that she had last contacted her parents in March 2011, two months before she married [Mr B]. She claimed her parents and other family members would kill her if she returned to India. The delegate put to the applicant that she had been refused partner visas because it was found that she was not in a genuine spousal relationship with [Mr B] and hence it seemed unlikely her family in India would harm her. The applicant offered no comment.

Home visit notes

18. The home visit notes indicate that on their visit to the applicant's residence [in] February 2014, the Department officers found evidence that the applicant was living with [Mr A] but no evidence that [Mr B] was living at the address. The partner refusal decision record refers to the visit.

Money transfer records

19. The substance of the money transfer records was put to the applicant at the delegate's interview on 14 December 2016. Specifically, that they indicated the applicant had been sending money to her father and brother during the period of her marriage to [Mr B] and that [Mr A] had sent money to her father and brother on eight occasions. The delegate put to the applicant that this indicated contact and financial support between the applicant, [Mr A] and her parents. The applicant responded that she had not sent any money.

Information and evidence provided on review

Review application

20. The applicant's review application included a copy of the decision record refusing her a protection visa (protection visa decision record). It referred to information from the home visit notes and money transfer records.

Additional evidence

21. On 12 June 2017 the applicant informed the Tribunal by email that she and [Mr B] had divorced and submitted an Australian divorce certificate stating that the divorce took effect [in] June 2017.

Requests for further evidence

22. On 9 July 2019 the Tribunal informed the applicant that her matter was being prepared for allocation to a Tribunal member which may result in a hearing being scheduled. The applicant was thus advised to submit any additional evidence as soon as possible. On 29 July 2019 the applicant responded that she was ready for a hearing in the coming months and submitted a picture of the biodata page of an Indian passport issued to her [in] 2019.

23. Following some delay due to the COVID-19 pandemic, the applicant was informed on 4 November 2020 that the Tribunal was in the process of scheduling an in-person hearing on 11 December 2020. The applicant was also informed that any documents she intended to rely upon to support her case should be provided electronically at least 7 days prior to the hearing. On 5 November 2020 the applicant advised the Tribunal that she was unable to attend a hearing on 11 December 2020 due to her physical condition. She submitted a medical certificate dated [in] November 2020 which stated that she was suffering from 'Severe Stress With Pregnancy over 28 weeks with past h/o two successive Miscarriages And MVA last Year with Whiplash with neck and back pain, Now She Needs Regular Specialist Review For Pregnancy continuation'. The doctor indicated that it would be stressful for the applicant to attend the hearing on 11 December 2020 but that she could attend a hearing after the birth of her child which was due on [date]. On 13 November 2020 the Tribunal sought some further information from the doctor and a response was received on 16 November 2020.
24. On 27 November 2020 the Tribunal informed the applicant that in light of the medical evidence, the Tribunal would not proceed with the hearing until after the birth of her child. The Tribunal also asked whether, in the meantime, the applicant could submit a written statement setting out all her reasons for seeking protection together with any supporting documentary evidence. As no response was received, the Tribunal emailed the applicant on 18 December 2020 and asked for her response by 29 December 2020. The applicant responded on the same day that she did not have any supporting document to submit and there was no change to her previous statement.

Invitation to hearing

25. On 19 February 2021 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to her review application, but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing 16 March 2021. In emails sent to the Tribunal on 8 and 9 March 2021 the applicant stated that she accepted the delegate's decision, she did not wish to give oral evidence at the hearing and consented to the Tribunal proceeding to make a decision on the review 'on the papers' without taking any further action to allow or enable her to appear before it. She stated she wanted a decision 'on the papers' to allow her 'to make a request to the Minister' because she had an Australian citizen child. The Tribunal also notes that during a telephone conversation with an officer of the Tribunal on 9 March 2021, the applicant referred to [Mr A] as her husband.³
26. This matter has therefore been determined by the Tribunal without a hearing.

27. CONSIDERATION OF CLAIMS AND EVIDENCE

28. The issue in this case is whether there is a real chance that the applicant will be persecuted or suffer significant harm if she returns to India as she has claimed. For the reasons given further below, the Tribunal has concluded that the decision under review should be affirmed. A preliminary issue is the non-disclosure certificate and notification on the Department file.

Non-disclosure certificate and notification

29. The Minister (or delegate) may place restrictions on material given to the Tribunal by the Department by certifying, pursuant to s.438(1)(a), that disclosure of the material is contrary to the public interest or by notifying the Tribunal, pursuant to s.438(1)(b), that it was given in confidence to the Department. Where a valid s.438 certificate or notification is issued, the Tribunal must reveal the existence of the certificate or notification to the applicant concerned

³See Casemate case note dated 9 March 2021.

and inform the applicant how the Tribunal intends to deal with it.⁴ For the certificate to be valid, a public interest reason for the non-disclosure of the information must be specified in the certificate. For a notification to be valid the document or information must have been given in confidence.

30. In this case the non-disclosure certificate and notification states that it applies to information in folios 97 to 294 on the Department file. The documents from folios 101 to 294 are the money transfer records and the documents at folios 97 to 100 are emails sent between officers of the Department requesting and providing the money transfer records. The non-disclosure certificate and notification states that s.438(1)(a) and s.438(1)(b) applies to the information in those folios 'because it relates to internal deliberations of the Department and contains documents affecting personal privacy'. However, in the Tribunal's opinion, those reasons could not form the basis of a claim for public interest immunity. Further, neither of those reasons nor the documents themselves disclose that the information in the folios have the necessary quality of confidentiality. Folio 100 has been stamped three times with the words 'confidential' but that is not indicative that the document or the money transfer records were given to the Minister or a Departmental officer by a third party with the expectation that the material be treated as confidential and would not be disclosed. Information contained within one of the emails indicates that there was an expectation that the information in the money transfer records might be disclosed to the Tribunal and the applicant– which the delegate did at the interview with the applicant. Thus, the Tribunal finds that the certificate and notification is not valid.
31. Hence, the Tribunal has not disclosed the existence of the certificate and notification prior to its decision. Further, the Tribunal notes that the substance of the information in the money transfer records was disclosed to the applicant by the delegate at the interview on 14 December 2016.

32. Consideration of claims

33. The mere fact that a person claims to fear persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is 'well-founded' or that it is for the reason claimed. Similarly, that an applicant claims to face a real risk of significant harm does not establish that such a risk exists, or that the harm feared amounts to 'significant harm'. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. A decision-maker is not required to make the applicant's case for him or her. It is the responsibility of the applicant to specify all particulars of the claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish the claim. The Tribunal does not have any responsibility or obligation to specify, or assist in specifying any particulars of the claim, or to establish or assist in establishing the claim: s.5AAA. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo* (1997) 191 CLR 559 at 596, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70).
34. The applicant's claims are assertions which the Tribunal has not had the opportunity to test at a hearing. Further, the information the applicant has provided about her claims and reasons for seeking protection are lacking.
35. The applicant indicated in her written statement that her parents initially agreed to her marrying [Mr B] but has not explained why they did so if they and the applicant's village had the strong views she claimed they had about her marrying an Indian and within her religion. The applicant has not responded to the finding that her relationship with [Mr B] was not a genuine spousal relationship or why her parents would harm her if it was not a genuine

⁴*MZAFZ* [2016] FCA 1081 (Beach J, 7 September 2016) and *MIBP v Singh* [2016] FCAFC 183, (Kenny, Perram and Mortimer JJ, 19 December 2016).

spousal relationship. The applicant applied for the protection visa on the basis that her parents, family and village would kill her due to her marriage to [Mr B] and stated on review that her reasons for seeking protection had not changed. However, she and [Mr B] are no longer married. Further, even though the Tribunal invited her to provide additional supporting evidence and a written statement setting out her reasons for seeking protection, the applicant provided no information about why her parents, family and/or village would kill her for marrying [Mr B] a decade ago when they have been divorced for over 3½ years. Given the applicant did not provide any new evidence or information in response to the Tribunal's earlier requests and has requested a decision without a hearing, the Tribunal has decided to proceed to make its decision on the evidence before it without giving the applicant a further opportunity to provide additional written information.

36. The Tribunal accepts on the basis of the applicant's passport that she is a national of India. However, as the applicant claims are untested assertions which lack detail in the way described in the preceding paragraph, the Tribunal is not satisfied that the applicant's parents, family members, and/or her village disapproved of her marriage to [Mr B], have threatened her, want to kill her or subject her to any other form of serious harm or significant harm.
37. The Tribunal is therefore not satisfied on the evidence before it that the applicant has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Nor is the Tribunal satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. Consequently, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(a) or (aa).
38. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

39. The Tribunal affirms the decision not to grant the applicant a protection visa.

Mila Foster
Member

ATTACHMENT - Extract from *Migration Act 1958*

5 (1) Interpretation

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

5H Meaning of refugee

- (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a ***refugee*** if the person is:
 - (a) in a case where the person has a nationality – is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
 - (b) in a case where the person does not have a nationality – is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a ***well-founded fear of persecution*** if:

- (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
- Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a ***well-founded fear of persecution*** if effective protection measures are available to the person in a receiving country.
- Note: For effective protection measures, see section 5LA.
- (3) A person does not have a ***well-founded fear of persecution*** if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
- (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
- (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:
- (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a ***well-founded fear of persecution*** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the ***first person***), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or
 - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;
 where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.
- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
 - (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

- (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...